

VZCZCXRO2278
OO RUEHWEB
DE RUEHBS #0810/01 0710617
ZNY CCCCC ZZH
O 120617Z MAR 07 ZDK CTG #597
FM USEU BRUSSELS
TO RUEAIIA/CIA WASHDC IMMEDIATE
RUEAWJA/DEPT OF JUSTICE WASHDC IMMEDIATE
RHEHNSC/NSC WASHDC IMMEDIATE
RUEKJCS/DOD WASHDC IMMEDIATE
RUEHC/SECSTATE WASHDC IMMEDIATE
INFO RUCNMEM/EU MEMBER STATES COLLECTIVE PRIORITY

C O N F I D E N T I A L SECTION 01 OF 04 BRUSSELS 000810

SIPDIS

SIPDIS

DOD FOR JIM HAYNES
NSC FOR RICHARD KLINGLER
DOJ FOR STEVE BRADBURY AND KEN WAINSTEIN
CIA FOR JOHN RIZZO

E.O. 12958: DECL: 03/08/2017

TAGS: [PTER](#) [PREL](#) [EUN](#)

SUBJECT: DISCUSISONS WITH THE EU AND NATO ON LEGAL ISSUES
ASSOCIATED WITH THE WAR ON TERRORISM

BRUSSELS 00000810 001.2 OF 004

Classified By: Classied by EMIN John Sammis for reason 1.4 (b) and (d)

11. (C) Summary. John Bellinger, Legal Adviser at the State Department, and Joshua Dorosin, Assistant Legal Adviser for Political and Military Affairs, met February 27 with their counterparts from the 27 EU Member States and representatives from the Council and Commission Secretariat. The majority of the three hour meeting was devoted to discussion of the U.S. response to the EU non-paper on principles of international law relevant to counter-terrorism and concluded with a short update on developments in the United States. There was considerable discussion of whether it is possible as a legal matter for a state to be in an armed conflict with a non-state actor, like Al Qaeda, outside that state's territory and what specific rules would govern the treatment of individuals detained in such a conflict. In this connection, Bellinger explained that the U.S. Supreme Court had decided that only a narrow part of the Geneva Convention - Common Article 3 - applies to Al Qaeda detainees and that the limited nature of Common Article 3 does not provide a comprehensive framework for this kind of conflict. Bellinger stressed that the dialogue with the EU has been beneficial in highlighting the complexity and nuances of these issues. He also noted that it is important to remember that the United States and EU member states have different legal obligations. Bellinger said that over the next few years the US and others will need to work together and assess the sufficiency of the existing legal framework. Discussions with the EU on the non-paper will continue in March in Strasbourg. End summary.

Discussions with the EU

12. (C) Bellinger started by noting that this dialogue has been going on for a year and that the United States has benefited from the exchange. He said that the U.S. position has been informed by the comments from the European side and has served to clarify the existing legal framework. Turning to the EU non-paper on principles of international law relevant to counter-terrorism, he said that the United States agrees with many of the elements of the paper. The points of disagreement, he said, are well known and include extra-territorial application of the ICCPR and the Convention Against Torture (CAT). Bellinger indicated that some of the elements of the EU non-paper are overly broad and do not take

into account specific scenarios that could arise. Bellinger appreciated that the non-paper accepts that the applicability of international humanitarian law (IHL) has to be looked at on a case by case basis. The UK and France agreed that the United States and the EU have different legal obligations but said that there should be a common interpretation where the obligations are the same. Sweden said that the problem was not when a country applied a higher standard but when the standard was &watered down.⁸

Application of international humanitarian law

13. (C) Bellinger argued that the &global war against terror⁸ is a political rather than a legal statement. He stressed that the important aspect is that there is an armed conflict with a non-state actor that is attacking the United States in different places around the world. Bellinger noted that the United States and the EU have come closer on this question. Initially, the EU position was that there was no conflict anywhere and the EU perception was that the United States was saying that the conflict was everywhere; the two sides now agree that there is armed conflict in some places. Denmark and the UK agreed that a state can be in armed conflict with a non-state actor, but stressed the need for territorial and other factors that define the conflict. The UK asked how al Qaeda is defined. Bellinger responded that defining when and where IHL applies to the conflict with al Qaeda is not easy, but that it is important to recognize that IHL does apply in some cases. In other cases a criminal law framework would be appropriate. Bellinger noted that the UN report on Guantanamo had not looked at IHL and therefore misstated the appropriate legal framework for the analysis. Bellinger encouraged EU member states to raise this problem with UN officials.

Protection for detainees

14. (C) Bellinger explained that the U.S. Supreme Court had

BRUSSELS 00000810 002.2 OF 004

decided that only a narrow part of the Geneva Convention - Common Article 3 - applies to Al Qaeda detainees and that the limited nature of Common Article 3 does not provide a comprehensive framework for this kind of conflict. France and Germany argued that Article 575 of Additional Protocol I should also apply. Bellinger responded that the U.S. reflects these stand legal @dh`uman Qights law in situatioping area of the law. He pointed out that human rights law was designed to cover a state,s treatment of its own nationals, and cannot simply be imported wholesale into situations of armed conflict.

Procedural rights of detainees and extraterritorial application of ICCPR

17. (C) The discussion on this element focused on whether the detainees have procedural rights (as the EU paper states) or whether states have obligations to provide detainees with particular forms of process, depending on the status of the detainee. Bellinger agreed that detainees have rights but that these flow from the obligation on states to provide procedural protections, rather than as individual protections. France, Sweden, and Belgium argued that there are individual rights as well, because human rights law, which provides individual rights, also applies. Bellinger noted that creating individual rights of action could result in a mass of litigation. On this point, Bellinger stated that the United States disagrees that the ICCPR creates a legal requirement to extend human rights protections outside the territory of a state party. The EU non-paper states that the ICCPR applies to acts done by a state in the exercise of its jurisdiction outside its own territory. The U.S. position is that the ICCPR applies to individuals who are both within a state,s territory and subject to that state,s

jurisdiction. The European Commission, supported by Sweden, noted that the U.S. position is creating the impression that there is a deliberate gap in the law that applies to detainees. Bellinger accepted this difficulty but stressed that this is a result of the current legal framework. He said that over the next few years the United States and others will need to work together and assess what rules should apply in these circumstances.

Expulsion, return, and extradition

18. (C) Bellinger stated that the United States believes that Article 3 of the Convention Against Torture does not apply to individuals who are outside the territory of the State Party. The EU's non-paper seems to imply that renditions should be prohibited. Bellinger noted that renditions are not per se illegal and, in certain rare circumstances, have an important role to play in the fight

BRUSSELS 00000810 003 OF 004

against terrorism; he advocated that the EU take a more nuanced view on this issue. Bellinger stated that the U.S. policy is not to hand over an individual to another state where it is more likely than not that the individual will be tortured. Bellinger said the problem with the non-paper and the report of the European Parliament's Venice Commission is that they are overly broad.

Detention without notice

19. (C) Bellinger stated that detention without notice does not violate international law. France and Belgium argued that secret detention is not legal and noted the recent signing of the Enforced Disappearance Convention.

Recent developments in U.S. law

110. (C) At the end of the meeting, Bellinger provided an update on the recent decision of the D.C. Court of Appeals and the military commission rules. Bellinger explained that the court had interpreted the Military Commissions Act and found that the statute constitutionally removed habeas jurisdiction over the claims of Guantanamo detainees. Bellinger stressed that what the press had missed is that detainees do have a different right to appeal directly to the U.S. courts under the Military Commissions Act and Detainee Treatment Act. Bellinger said that in January DOD finalized the rules of procedure that will apply to the military commissions. Dorosin explained that the procedures are similar conceptually to court martial proceedings and cover three elements: general rules of procedure, rules of evidence, and crimes triable by military commission. Dorosin explained that the procedures provide safeguards to ensure a full and fair trial that are fully consistent with Common Article 3, the standard that the Supreme Court found applicable to the U.S. conflict with Al Qaeda. Dorosin indicated that there has been some concern with respect to the use of coerce the rules reher hand. t`@Q`hh es. To them, t Mr. Bellinger noted the United States adheres to the Geneva Conventions but stressed that Article 3, which our Supreme Court determined was the only part of the Geneva Conventions applicable to our conflict with al Qaeda, does not comprehensively address all aspects of detention in conflicts with non-state actors. Despite the perception that the United States is bending or breaking the rules, Mr. Bellinger noted there are in fact no clear rules. While no decisions had been made on how to address this situation, if the Geneva Conventions are to be changed or enhanced, it will take years of serious consultations. However, Mr. Bellinger reassured the NATO PermReps that, in the interim, the rights of detainees are being protected to the extent of existing international law wherever U.S. troops operate around the world. He encouraged his interlocutors to speak publicly about the limitations of international law on these issues.

BRUSSELS 00000810 004 OF 004

¶13. This cable has been cleared by Mr. Dorosin.

Gray

.